Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation	)	MM Docket No. 92-266
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation	)	MM Docket No. 93-215

OPPOSITION TO PETITION FOR RECONSIDERATION

The Home Shopping Network, Inc. ("HSN"), pursuant to Section 1.429(f) of the Commission's Rules, hereby opposes the petition of the City of St. Joseph and Benton Charter Township ("West Michigan Communities") for reconsideration of the Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking ("Sixth Order") in the above-captioned proceeding.

INTRODUCTION

The Sixth Order substantially amended the Commission's "going forward" rules for adjusting rates when channels are added to, deleted from, or substituted on regulated tiers. It revised the Commission's approach to regulating discounted packages of "à la carte" services. And it established rules allowing cable operators to offer "new product tiers" on a generally unregulated basis. The West Michigan Communities' petition is not, however,

concerned with these major revisions to the rules. It focuses solely on a single sentence regarding Section 76.922 of the Rules, which clarifies the manner in which cable operators, in calculating their permissible rate increases under the rate regulation price cap, must offset programming cost increases with revenues received from programmers.

This clarification did not, as the petitioners contend, represent an "abrupt reversal" of Commission policy. To the contrary, the added sentence simply removed any ambiguity regarding the meaning and intent of the original rule, which the Commission adopted almost two years ago and clarified in two letter rulings last May. And, contrary to the petitioners' arguments, the rule -- which provides that cable operators, in calculating rate adjustments for changes in "external costs", must offset increases in the cost of a program service with payments received from the programmer <u>on a channel-by-channel basis</u> -- is wholly consistent with the Commission's statutory mandate and with sound public policy.

The rule reflects the Commission's recognition of the fact that, in the competitive cable programming marketplace, payment for carriage can flow in two directions. Some programmers are paid for the right to be carried by cable systems, while others must pay the cable operator to gain carriage on its system. Requiring cable operators to offset the total amount paid to programmers on a tier by the total amount

received from other programmers on the tier would, in effect, make it impossible for programmers to compensate operators for carriage -- and it would, as the Commission recognized, unfairly discriminate against those programmers that typically are required by the economics of the marketplace to pay for carriage.

I. THE COMMISSION HAS NOT CHANGED THE SUBSTANCE OF ITS RULE.

In its first Report and Order[1/] adopting rate regulation rules pursuant to the Cable Competition and Consumer Protection Act of 1992,[2/] the Commission decided that after a cable operator's initial rates for basic service or cable programming service tiers were established by the franchising authority or the Commission, future rate increases would be subject to a price cap. The price cap rules allowed operators to pass through to subscribers increases in certain "external costs," including programming cost increases. But the rules also provided that "[a]djustments to permitted charges on account of increases in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer." 47 C.F.R. § 76.922(d)(3)(x).

The language of that provision was somewhat ambiguous. Did it mean that the total increased costs of programming were to

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1/ Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) ("First Report and Order").

2/ Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992).

be offset by the total revenues received from all programmers? Or were such offsets to apply on a channel-by-channel basis, so that payments received from a particular programmer would only offset the costs of that programmer?

Both the language of the rule and common sense seemed to favor the latter interpretation. The rule required that programming cost increases be offset by revenues received from "the programmer" -- not from all "programmers." Moreover, a rule that required operators to offset increased costs of some program service by payments received from other services would effectively skew the programming marketplace because programmers who compensate cable operators for carrying their service would subsidize costs and cost increases imposed by others. Reducing the operator's revenues from subscriber fees, dollar for dollar, by any compensation from any programmer would artificially discourage the carriage of any services that provide payments to operators -- because the operators would not receive any benefits from such payments.

HSN does not charge cable operators a fee to carry its shopping channels; to the contrary, it compensates operators for carriage by paying commissions on home shopping sales to the operators' subscribers. To allay any fears of cable operators that such commissions and other compensation that they received from HSN would directly reduce their maximum permissible rates, HSN last May asked the Commission to clarify that this was not

what Section 76.922 (d)(3)(x) required. On May 6, 1994, the Commission, in a letter to HSN, issued just such a clarification.[3/] Specifically, the Commission

> clarified that Section 76.922(d) (3) (x) of the Commission's rules, and the relevant portions of the instructions to FCC Form 1210, require only that payments from programmers to operators be offset on a channel-by-channel basis. Under a channel-by-channel offset, any rebates or payments in consideration of carriage from a programmer will be applied to payments from the operator to the programmer, but will not offset payments to other programmers. This will assure that only the net costs of obtaining programming are passed through to subscribers. At the same time, where, as in the case of HSN's shop-at-home services, payments are only made from the programmer to the operator, or, where the payments from the programmer exceed payments from the operator, the operator may receive the benefit of the payment without decreasing or increasing charges to subscribers. Thus, this approach will fairly balance the interests of programmers, subscribers, and operators. It will also facilitate the provision and promotion of useful home shopping services to the public.[4/]

Having made clear last May that its rule was never meant to require anything but channel-by-channel offsets, the Commission took the opportunity, in amending its rules in the Sixth Order, to remove any ambiguity in the language of the rule.

3/ See Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau to Peter H. Feinberg, May 6, 1994. See also Letter from Alexandra Wilson to Sue D. Blumenfeld and Philip L. Verveer, May 6, 1994.

4/ Letter from Alexandra M. Wilson to Peter H. Feinberg, supra (emphasis added) (footnote omitted).

It added a sentence to Section 76.922(d)(3)(x), specifying that "[s]uch adjustments shall apply on a channel-by-channel basis." The West Michigan Communities suggest that this change in the language of the rule represents an "abrupt reversal"[5/] of the substance of the rule and seek reconsideration of this "new channel-by channel adjustment."[6/] But, as we have shown, there is nothing new about the Commission's rule. The decision to require offsets on a channel-by-channel basis was made when the Commission first adopted Section 76.922(d)(3)(x) in 1993, and the Commission clarified that this was the case last May. There is nothing new in the Sixth Order to be reconsidered at this time except the Commission's decision to clarify the language of the rule to comport with its previously issued clarification of the original language and intent of the rule.

II. APPLYING OFFSETS ON A CHANNEL-BY-CHANNEL BASIS INSTEAD OF A TIER-WIDE BASIS IS WHOLLY CONSISTENT WITH THE ACT AND WITH SOUND PUBLIC POLICY.

Wholly apart from the staleness of their petition for reconsideration, the West Michigan Communities' legal and policy arguments for reconsidering the decision to apply programming cost offsets on a channel-by-channel basis are utterly groundless. As a legal matter, there is absolutely nothing in Section 623 that "require[s] that cable operator revenues from

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5/ Petition for Reconsideration at 3, 7.

6/ Id. at 9.

programmers be adjusted on a tier basis rather than on a channel-by-channel basis."[7/] The West Michigan Communities rely on the Commission's statutory mandate to "take into account . . . revenues (if any), received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic tier."[8/] But the Commission has quite clearly and directly taken such revenues into account in fashioning its rules.

The Commission specifically determined that revenues received from a programmer should offset the costs of that programmer for purposes of external cost increases. It also determined that revenues received from a programmer should not offset costs associated with other programmers, and that advertising revenues should not offset any external costs -- although all revenues are to be included in any cost-of-service review of an operator's rates.[9/] The Act requires only that the Commission take operator revenues into account in establishing standards for regulating rates. The Commission clearly did so, and it explained why it required offsets for some such revenues but not for others.

7/ Id. at 6.

8/ 47 U.S.C. § 543(b)(2)(C)(iv), quoted in Petition for Reconsideration at 5.

9/ See First Report and Order, supra, 8 FCC Rcd at 5789 n. 602.

As a policy matter, the West Michigan Communities argue that requiring cable operators to offset programming costs with revenues on a tier-wide basis instead of on a channel-by-channel basis would "remove[] the incentive a channel-by-channel offset gives cable operators to add no cost or pay for carriage programming instead of programming with acquisition costs."[10/] Indeed, it would remove any incentive at all to add "pay for carriage" programming by essentially making it impossible for cable operators to charge for carriage. Any amounts paid by programmers for carriage would simply reduce the operators' subscriber revenues. Thus, an entire range of services for which the value of carriage to the programmer exceeds the value of carriage to the operator would be placed at an artificial competitive disadvantage vis-à-vis services for which operators are willing to pay.

The West Michigan Communities seem to think that, as a general matter, cable systems should be given incentives to carry programming for which they have to pay and should be discouraged from carrying services that do not charge for carriage or that pay for carriage. Thus, they complain that, just prior to regulation, their franchisee "added approximately 20 channels which it receives effectively free (and dropped four channels which had acquisition costs)."[11/]

10/ Petition for Reconsideration at 4.

11/ Id. at 3.

The Michigan system evidently added 23 new services, including, in addition to eight shopping channels, the following services: "Showcase, VISN/Acts, The Outdoor Channel, The Box, Z Music, The Travel Channel, C-SPAN II, EWTN, TBN, MOR Music, The Food Network, National Empowerment Channel, New Inspiration TV, Keystone Inspiration, and Dr. Gene Scott."[12/] The fact that these services, whether because they are new services seeking exposure to subscribers or because they obtain revenues from advertising and from home shopping based on their viewership, are able and willing to give their services to operators at no charge or even to pay for carriage does not in any way mean that they are "inferior" services. The Commission recognized as much when it noted that its channel-by-channel offset approach would "facilitate the provision and promotion of useful home shopping services to the public."[13/] And to suggest that replacing any of the services identified above with services that charge operators for the right to be carried would necessarily be an improvement and serve the public interest is to betray a complete misunderstanding of the economics of the affiliation relationship between operators and programmers.

The value of programming to subscribers does not vary directly with the cost of the programming to the cable operator,

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12/ Id. at 3-4.

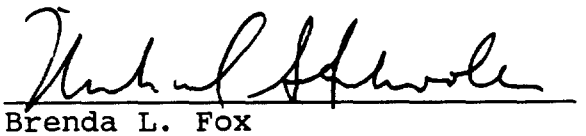
13/ Letter from Alexandra M. Wilson to Peter H. Feinberg, supra.

and there is no public policy basis for effectively precluding programmers from paying operators for carriage. The Commission recognized these facts when it adopted its channel-by-channel offset approach. The West Michigan Communities provide no basis for rejecting them or for revising that approach.

CONCLUSION

For the foregoing reasons, the petition for reconsideration should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Ruby R. Brown, hereby certify that on February 3, 1995, copies of the foregoing Opposition To Petition for Reconsideration, were served by First Class Mail, postage prepaid, to the following:

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